OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 98-11 February 20, 1998

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Compliance Cases

The Compliance Reinvention Committee recently issued a detailed report to the General Counsel, identifying a number of recommendations with respect to the processing of compliance cases. The Committee's report was circulated to the field for reaction and comment. Your responses were much appreciated and have been carefully considered.

While some of these recommendations are still under consideration, and were discussed during the recent Regional Management Conference in June, we are setting forth below those recommendations which have been adopted, as follows:

1. **Delegation of Case Closing Authority in Board Order Compliance Cases**

2. **Establishment of Compliance Information Line in the Contempt Litigation and Compliance Branch**

3. **Alternate Methods of Backpay Calculation**

4. **Expanded Use of Section 11 Subpoenas**

5. **Approaches to Recidivism and Expanded Use of Formal Settlements**

1. DELEGATION TO REGIONAL DIRECTORS OF AUTHORITY TO CLOSE BOARD ORDER COMPLIANCE CASES

Previously, Regions have been required to obtain authorization from Operations-Management to close a case where there was no reasonable likelihood of collection from the respondent or any derivatively liable entity, or where the case was otherwise appropriate for closing. After careful consideration of our past experience in this area, we have concluded that a partial delegation of case closing authority, as discussed below, is appropriate.

Effective with this memorandum, **Regional Directors are authorized to close Board Order compliance cases without obtaining prior approval from the Division of Operations-Management.** As set forth below, the closing of court-judgment compliance cases still requires headquarters approval, although with streamlined procedures.

Regions should continue to apply the guidelines set forth in Section 10605 of the Casehandling Manual, Compliance Proceedings (Part Three) for closing a case on noncompliance. The investigation should address such issues as the background of the underlying unfair labor practice; the amount owed; the current status of the respondent's operations and the likelihood of their future resumption; the disposition of the respondent's assets; a review of liens and judgments against the respondent; and evaluation of the status of the corporate charter or business licenses. In addition, as appropriate, the Region should consider whether there are related entities, such as parent or subsidiary corporations, which may be held liable for backpay; whether there is evidence to establish derivative liability through determination of alter ego, successorship, or individual liability of corporate officers or owners; and an assessment as to whether those for whom there may be derivative liability have the financial means to make payment of the monetary remedy.

Prior to the closing of any case without compliance, or recommending that action, the Region should obtain the charging party’s position with respect to closing and reflect this position in the agenda minute (and in any formal recommendation which may be necessary in a post-judgment case.) The charging party’s position, and any accompanying evidence should be carefully evaluated before arriving at a final determination. In circumstances where the charging party objects to the closing of a case without full compliance, Regions should also continue to observe the provisions with respect to a charging party’s right to a compliance determination. See Casehandling Manual, Compliance Proceedings (Part Three), §10575, and Section 102.53 of the Board’s Rules and Regulations.

The Region's decision to close a case must be formalized in a letter to the parties.[1] However, **prior** to issuing this letter, an agenda minute or other document setting forth the compliance efforts undertaken, and the reasons why additional compliance steps would not be prudent, must have been prepared and placed in the case file. **In order to evaluate the experience with this delegation, Regions are required to submit the agenda minute, or other documentation setting forth the basis for their determination, to the Division of Operations-Management after closure of the case.**

In all cases involving enforced Board Orders, Regions are still required to obtain headquarters authorization prior to closing a case in which compliance has not been achieved. See Casehandling Manual, Compliance Proceedings (Part Three), §§10590, et seq. However, this authorization may now be obtained telephonically from the Contempt Litigation and Compliance Branch. Regions are encouraged to use this procedure, which would eliminate the need for preparation of any document other than the agenda minute. If the telephonic consultation does not resolve the issue, or if a formal recommendation is otherwise warranted, the Region should, pursuant to the above manual provision, continue to submit this recommendation to Operations-Management, with a copy to Contempt. As in the past, Operations will consult with Contempt before reaching a determination.

The establishment and implementation of this change in policy is intended to assist the Regions in closing cases where additional compliance resources should not be expended, thereby reducing the backlog of compliance cases while preserving compliance resources. As always, cases should be reopened where fruitful avenues for obtaining compliance are subsequently brought to the Region's attention. See Casehandling Manual, Compliance Proceedings (Part Three), §10605.

2. ESTABLISHMENT OF COMPLIANCE INFORMATION LINE IN CONTEMPT LITIGATION AND COMPLIANCE BRANCH

In order to further implement reinvention of the Contempt Litigation and Compliance Branch, and to aid in the Branch's efforts to provide more prompt and useful assistance to the Regions in their compliance work, the Branch has established a "compliance information line" through which the Regions may informally obtain telephonic advice and assistance with respect to any compliance matter on which they want to obtain information, as well as sample pleadings and other legal documents. Every effort will be made to have a Branch attorney take the call as it is received, but if no attorney is available to take the call at that time, the call will be returned no later than the end of the day. The information line is designed to function informally - no formal submissions are required or expected.

Through the compliance information line, the Branch can assist the Regions with

---

[1] If a Region believes that a case should be closed "administratively" (i.e., without notice to the parties), prior approval must be obtained from Operations-Management.

casehandling strategies in connection with the spectrum of compliance cases (collection, bankruptcy, inability to pay, successor/alter ego/corporate veil piercing and fraudulent conveyance). Through the information line as well as other communications, the Branch will also assist in ensuring that the Regions are aware of new and innovative compliance tools and successful compliance techniques. In this regard, the Branch has distributed to the Regions an up-to-date compliance handbook, in hardcopy form, containing an integrated compliance reference material system. This handbook contains not only legal research memoranda covering frequently encountered compliance issues, but also sample pleadings. An electronic copy of the handbook will be sent to each Region in the near future.

With respect to those cases in which the Regions intend to send a formal referral to the Contempt Litigation and Compliance Branch, the Regions are strongly encouraged to call the Branch prior to preparing the referral. This will allow the Branch to consult with the Regions for the purpose of assisting them in keeping to a minimum the time and effort spent in preparing case referral memoranda and accompanying evidentiary submissions.

The telephone number for the compliance information line is (202) 273-3740. Please continue to feel free to call any Branch attorney directly.

3. USE OF ALTERNATIVE, CREATIVE METHODS IN BACKPAY DETERMINATIONS

There are many cases in which considerable Agency resources have been devoted to obtaining a precise calculation of the monetary remedies owed by respondents. Cases that require backpay for large numbers of discriminatees over extended backpay periods, such as mass discharge, contract abrogation and dues reimbursement cases, are often prolonged because of the time required to investigate and complete individual backpay determinations using traditional Board methods. In light of the staffing shortages in many Regions, these cases are frequently taking even longer to complete than in the past, and the individuals harmed by the underlying unfair labor practices must often wait extremely long periods of time for the monetary relief to which they are entitled.

In order to expedite and make more manageable the calculation of monetary remedies, the Regions are encouraged to explore the broader use of innovative methods to determine and distribute backpay, even where such methods may result in less than absolutely precise computations of the amounts owed or, in appropriate circumstances, the complete exclusion of de minimis claims.

A number of Regional Offices have already developed significant experience with these principles, and have reported that such techniques have resulted in the prompt resolution of large and complex cases. The Contempt Litigation and Compliance Branch is also working with several Regions, on an experimental basis, to test the applicability of statistical sampling techniques to various case situations. The continued

development of alternative approaches will enhance our productivity and effectiveness and may result in significant savings of Agency resources.

Regions are strongly encouraged to consider the use of alternative approaches to the problems associated with the computation and distribution of backpay and other monetary remedies involving large numbers of individuals, and to seek assistance and advice from the Contempt Litigation and Compliance Branch with respect to these matters. The Contempt Litigation and Compliance Branch is prepared to offer advice and assistance with respect to the use of such alternative methodologies, including referrals to statisticians from whom assistance may be obtained with respect to the design and implementation of appropriate sampling procedures. Regions who are already employing these techniques are encouraged to share with the CLCB samples, pleadings and summaries of strategies employed in these cases so that other Regions can benefit from their experiences.

The following are examples of some approaches that Regions may wish to consider:

- **Use of Approximations and Statistical Sampling Techniques**
  In cases involving both settlements and formal compliance proceedings, it may be possible to utilize reasonable approximations of gross backpay as well as interim earnings, in lieu of precise computations for each discriminatee. A variety of methods may be used to reach these approximations, including the use of widely accepted statistical sampling techniques. The exact methods appropriate to each situation will depend upon the nature of the remedy involved, what information is readily available, and other circumstances of the given case.

- **Exclusion of "De Minimis" Claims**
  In cases where large numbers of employees are entitled to relatively small sums of money, the conclusion may be reached that backpay should be paid only to those employees who are determined to be entitled to an amount of money in excess of a specified threshold, below which the claims may be considered "de minimis." While the determination of what is de minimis in a case will depend on the particular facts, it is anticipated that this designation will normally be limited to situations where discriminatees would receive backpay amounts of less than $100. If you deem a higher threshold as appropriate in a particular case, please consult with your Assistant General Counsel or Deputy.

- **Alternative Approaches to Distribution of "Lump Sum" Settlements**
  When total net backpay liability has been determined or agreed upon, it may be appropriate to develop and utilize innovative methods to expedite the distribution of backpay shares to individual discriminatees. In cases resolved by settlement, any equitable method of distribution to which the parties agree may be acceptable, including equal share distribution, omission of consideration of interim earnings and other factors in determining shares, and

use of formulas based upon averages or samples.

4. EXPANDED USE OF SECTION 11 SUBPOENAS TO FACILITATE COMPLIANCE INVESTIGATIONS

In recent years, Regional Directors have been delegated authority to issue Section 11 investigative subpoenas in virtually all compliance circumstances. Many Regions have used Section 11 subpoenas extensively with excellent results.[2] The primary advantage of using Section 11 subpoenas to obtain records and information relevant to compliance matters is that they provide a mechanism for using the force of judicial authority to obtain respondents' cooperation, and that they can be used to shift the burden of compiling necessary information onto respondents and third parties.[3]

For example, a respondent that ignores basic requests to submit information can be commanded by subpoena to appear for a deposition and to provide documents. The district courts do not take lightly noncompliance with investigatory subpoenas, and will readily enforce such subpoenas by an appropriate order.[4] Failure to comply with

---

[2] The Board's subpoena power "is limited only by the requirement that the information sought must be relevant to the inquiry." NLRB v. Carolina Food Processors, Inc., 81 F.3d 507, 511 (4th Cir. 1996) (quoting Link v. NLRB, 330 F.2d 437, 440 (4th Cir. 1964). Court's have characterized the Board's investigatory power as "akin to that of a grand jury." NLRB v. Alaska Pulp Corp., 149 LRRM 2684, 2688 (D.D.C. 1995). Thus, like a grand jury, the Board "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." NLRB v. Alaska Pulp Corp., 149 LRRM at 2688, quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

[3] Regional Directors have already been delegated authority to issue subpoenas without prior approval from the Division of Operations-Management in virtually all compliance circumstances. See General Counsel and Operations-Management memoranda OM 93-7, GC 94-9, GC 94-10, GC 95-9, and OM 95-59.

[4] It is well established that courts give wide berth to administrative agencies' investigatory efforts. See, e.g., Sandsend Financial Consultants, Ltd., v. FHLBB, 876 F.2d 873, 878-879 (5th Cir. 1989) (scope of court's inquiry in reviewing administrative subpoenas is limited to whether the investigation is for a proper statutory purpose and the information sought is relevant to that investigation); NLRB v. Carolina Food Processors, Inc., 81 F.3d 507, 510 (4th Cir. 1996) (district court "should enforce the Board's subpoena if the information sought is relevant to an investigation being conducted by the Board and is described with sufficient particularity").

such an order is sanctionable in contempt. In short, use of Section 11 subpoenas provides a basis for obtaining a recalcitrant respondent's cooperation in a compliance investigation through court enforced sanctions.

In Memorandum GC 94-9 (August 12, 1994), the following delegation was made to Regions with respect to the issuance of investigative subpoenas:

> Accordingly, Directors are authorized to issue investigative subpoenas duces tecum for the production of documents or other materials from any party or witness and investigative subpoenas ad testificandum to compel testimony from nonparty witnesses to secure evidence not conveniently available from other sources when that evidence may materially aid a merit determination and when foreseeable barriers to enforceability are not present.

This memorandum does not modify that delegation. Rather, Regions are encouraged to make the broadest possible use of their subpoena authority in compliance matters, subject to the standards set forth in Memorandum GC 94-9. If there are questions about the propriety or enforceability of a subpoena, please consult with your Assistant General Counsel or Deputy.[5] Following are two examples of situations in which the use of subpoenas may prove useful:

(1) The Regions should consider the use of subpoenas to order respondents to provide payroll and personnel information that is relevant to the drafting of a compliance specification. It has been held that agencies can order respondents to compile and **create new documents** based on information within their control. See EEOC v. Citicorp Diners Club, Inc*.,* 985 F.2d 1036, 1039 (10th Cir. 1993) and cases cited therein. In EEOC v. Citicorp Diners Club*,* for example, the Tenth Circuit rejected the employer's claim that the EEOC's subpoena seeking information relating to the employer's promotion policy (job postings, position descriptions, etc.) was improper because the requested documents did not exist and would have to be compiled based on interviews with employees.[6] **In order to coordinate potential subpoena enforcement litigation in this area, Regions wishing to pursue this kind of subpoena should consult in advance with the Contempt Litigation and Compliance Branch**.

---

5 Regions are reminded that Section 11 investigative subpoenas generally are not intended to be used after the issuance of a complaint or compliance specification to obtain evidence to support allegations already set forth in these pleadings.

6 Cases construing the EEOC's subpoena power are directly relevant to the scope of Section 11 because the relevant provision of Title VII incorporates Section 11. See EEOC v. Maryland Cup Corp., 785 F.2d 471, 476 n. 3 (4th Cir.), *cert. denied*, 479 U.S. 815 (1986).

(2) The Regions may use subpoenas to investigate such recurring compliance matters as a respondent's financial ability to pay backpay and the derivative liability of new parties not named in the original proceeding. Alaska Pulp, 149 LRRM at 2688-89. In Alaska Pulp, for example, the court enforced a Section 11 subpoena that sought information regarding the financial relationship between the named respondent and its foreign parent corporation.

The Regions should feel free to consult the Contempt Litigation and Compliance Branch for assistance in drafting such subpoenas. Further, to assist in compiling a centralized resource bank for compliance materials, the Regions are encouraged to send to the Contempt Litigation and Compliance Branch copies of any subpoenas that have proven useful in compliance investigations.

In using investigatory subpoenas, the Regions should be mindful that they are not limited to document production, but can also be used to compel respondents, their agents, or anyone else with knowledge to appear for a deposition, or to respond to **written interrogatories**.[7] The latter device should prove in many cases to be an efficient and useful substitute for, or supplement to, the more traditional use of subpoenas to compel deposition testimony and/or the production of documents. Investigative interrogatories can produce significant savings in personnel time by requiring respondents and others not only to compile and provide detailed compliance information in response to the specific questions asked, but also to compile and attach documents that verify their interrogatory answers, which documents must be segregated according to the interrogatory answer to which they correspond. Where a Region is considering using both interrogatories/document production requests and deposition testimony, it will generally be advantageous to obtain and analyze the answers to interrogatories and documents prior to conducting any depositions.

Again, the Regions should freely consult with the Contempt Litigation and Compliance Branch, both for assistance in drafting "interrogatory" and other subpoenas, and to enable the Branch to maintain a clearinghouse of compliance materials to be shared among the Regions.

5. APPROACHES TO RECIDIVISM AND EXPANDED USE OF FORMAL SETTLEMENTS

Recidivism is an area of special concern for the Agency. Violations of the Act by recidivists undermine the public's confidence in the ability of the Agency to effectuate the purposes and policies of the NLRA. The investigation and prosecution of unfair labor practices committed by entities that repeatedly violate the Act consume a

---

[7] The Board's subpoena power includes the authority to compel answers to interrogatories, as well as to obtain "everything it [could] seek from an order compelling discovery." Alaska Pulp, at 2689, quoting NLRB v. Interstate Material Corp., 930 F.2d 4, 6 (7th Cir. 1991).

substantial share of the Agency's limited resources. Therefore, priority should be given to efforts to identify such repeat offenders, and to obtain prompt and meaningful remedies with respect to unfair labor practices committed by such parties.

The Casehandling Manual presently sets forth in detail the approach to be taken by the Regions in situations involving allegations of noncompliance with affirmative provisions of enforced Board Orders, and/or allegations of additional violations of the Act by respondents against whom there are outstanding court judgments.[8] However, there currently exists no analogous programmatic approach designed to address situations involving respondents that repeatedly violate the Act, but against whom no court judgments have been obtained. Such situations may arise from a variety of circumstances, most typically involving the resolution of previous cases by informal settlement, or cases in which voluntary compliance with a Board Order is achieved prior to the initiation or completion of enforcement proceedings. Regions are urged to carefully consider the expanded use of formal settlements in situations in which new meritorious unfair labor practice charges are filed against respondents with respect to whom there have been previous "adverse merit determinations,"[9] even though there may be no prior court judgments involving such respondents.

Current Agency policy directs that, in appropriate circumstances, a formal settlement agreement should be used either before or after issuance of complaint where the respondent has a history of prior unfair labor practices. The Casehandling Manual also suggests that a formal settlement may be warranted where there is a likelihood of recurrence or extension of the current unfair labor practices, as well as where there is either continuing violence or a likelihood of recurring violence.[10]

---

8 Pursuant to Casehandling Manual, Compliance Proceedings (Part Three), §§10590, et seq., cases involving new meritorious charges concerning respondents against whom there are prior court judgments must be submitted to the Contempt Litigation and Compliance Branch.

9 As utilized herein, "adverse merit determinations" refers to any case or cases with respect to which, following investigation, complaint issued (for cases which have already been litigated, a complaint would of course be relevant only where the Agency ultimately prevailed on some or all complaint allegations), or an informal or formal settlement agreement was achieved. Merit cases dismissed on non-effectuation grounds should also be considered in assessing a respondent's history. Precomplaint non-Board settlements are not considered as constituting adverse merit determinations for purposes of this discussion.

10 Casehandling Manual, Unfair Labor Practice Proceedings (Part One), §10164. Formal settlements are preferred whenever a Region secures a settlement involving large sums of money, in order to facilitate collection and ensure the enforceability of any such agreement. See Memorandum OM 95-29 (March 31, 1995).

It appears that some Regions may have been reluctant to use formal settlements in the past due to concerns about the approval process. In this regard, however, Regions have now been given authority to approve bilateral formal settlements on behalf of the General Counsel and to submit such settlements directly to the Executive Secretary, without obtaining the prior approval of Operations-Management. See Memorandum GC 96-10 (September 8, 1996).

In order to ensure that the Agency's stated policies with respect to the use of formal settlements are more effectively and consistently followed, the following additional **guidelines** are provided:

1. In situations in which new meritorious unfair labor practice charges are filed against a respondent with a history of prior violations of the Act (even though no Board Order or court judgment was entered in the earlier case(s)), careful consideration should be given to insisting upon a formal settlement, including provision for the consent entry of a court judgment enforcing a Board Order, if the respondent desires to resolve the current matter short of litigation.[11]

2. It is recognized that circumstances may warrant the acceptance of an informal settlement even in situations where the unfair labor practice history of a respondent would weigh against such a course of action. While it is not possible to enumerate all of the potentially relevant factors that should be considered in assessing the efficacy of accepting an informal settlement in lieu of a formal settlement stipulation, the following factors are among those that might bear upon such a decision: a) the likelihood of a recurrence of unlawful conduct; b) the number and severity of past and current unfair labor practice allegations found to have merit; c) the size of the work force and the number of individuals adversely impacted by the past and current unfair labor practices; d) the strength of the available evidence supporting the current meritorious charges; e) the ability and need to obtain prompt remedies; and f) the pendency of an active organizing campaign.

3. Once a hearing before an administrative law judge has commenced with respect to a case in which the Region has determined that an enforceable Board Order is necessary, counsel for the General Counsel should normally advance that position by resisting any effort to resolve the pending case through an informal settlement, unless events occurring in the course of the trial cause the Region to alter its initial conclusion with respect to the need for a formal settlement. Should the Region continue to adhere to its initial view regarding the need

---

[11] If sought by a respondent, a formal settlement stipulation providing for the consent entry of a court judgment may include a non-admission clause. This is often an important factor in persuading a respondent to consent to the entry of a judgment. See CHM, Unfair Labor Practice Proceedings (Part I), §10164.4.

for a Board Order, the Region should consult with Operations-Management with respect to the appropriateness of seeking special review by the Board of an ALJ's decision to accept an informal settlement during the course of a trial.

4. In cases involving a respondent whose history of prior violations precludes acceptance of further informal settlements, and where a case is, thereafter, successfully litigated against such an entity before the Board, the Region should consider recommending to the Division of Enforcement Litigation the initiation of enforcement proceedings even in circumstances where there is voluntary compliance with the Board's Order. This is in recognition of the fact that only by obtaining a judgment against such a respondent will the Agency be in a position to seek contempt sanctions for subsequent violations of the Act.

If there are questions about any of the above items, please contact your Assistant General Counsel, Deputy AGC or the Contempt Litigation and Compliance Branch.

R.A.S.

cc: NLRBU